

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of Application of	)	
	)	
NATIONAL READY MIXED CONCRETE CO.,	)	FCC File No. 0001799643
Assignor	)	
	)	
MOBILE RELAY ASSOCIATES,	)	
Assignee	)	
	)	
For Consent to the Assignment of Licenses for	)	
Private Land Mobile Radio Stations KLH414 and	)	
KL3784, Corona, California	)	

**ORDER ON RECONSIDERATION**

**Adopted: February 21, 2007**

**Released: February 22, 2007**

By the Deputy Chief, Mobility Division, Wireless Telecommunications Bureau:

1. *Introduction.* We have before us a Petition for Reconsideration (Petition)<sup>1</sup> filed by National Science and Technology Network, Inc. (NSTN), seeking reconsideration of a decision by the Public Safety and Critical Infrastructure Division (PSCID or Division),<sup>2</sup> Wireless Telecommunications Bureau, denying NSTN's Informal Petition to Dismiss or Deny (PTD)<sup>3</sup> the captioned application to assign Private Land Mobile Radio Stations KLH414 and KL3784, Corona, California, from National Ready Mixed Concrete, Inc. (NRMC) to Mobile Relay Associates (MRA) (*Order*).<sup>4</sup> NSTN argues in the Petition that the Division incorrectly concluded that NSTN had failed to substantiate its claim that the subject licenses had cancelled automatically pursuant to Section 90.157 of the Commission's Rules<sup>5</sup> due to permanent discontinuance of station operation, precluding any assignment of the licenses.<sup>6</sup> According to NSTN, the Division misconstrued NSTN's arguments in the PTD, and ignored evidence proffered by NSTN to prove that NRMC had discontinued operation of the stations.<sup>7</sup> For the reasons discussed below, we deny the Petition.

<sup>1</sup> National Science and Technology Network, Inc., Petition for Reconsideration of Denial of Informal Petitions to Dismiss or Deny Submitted by National Science and Technology Network, Inc. (NSTN) (filed May 16, 2006) (Petition).

<sup>2</sup> Pursuant to a Commission reorganization effective September 25, 2006, certain duties of PSCID were assumed by the Bureau's Mobility Division. See Establishment of the Public Safety and Homeland Security Bureau, *Order*, 21 FCC Rcd 10867 (2006).

<sup>3</sup> Letter dated July 14, 2004 from Ted S. Henry, President, National Science and Technology Network, Inc., to Secretary, Federal Communications Commission (PTD).

<sup>4</sup> National Ready Mixed Concrete Co., *Order*, 21 FCC Rcd 5151 (WTB PSCID 2006) (*Order*).

<sup>5</sup> 47 C.F.R. § 90.157.

<sup>6</sup> See Petition at 1-3.

<sup>7</sup> *Id.*

2. *Background.* NSTN asserted in the PTD that the discontinuance of operations on Stations KLH414 and KL3784<sup>8</sup> was evinced by NRMC's utilization, as a paying customer of NSTN, of NSTN's co-channel Station WPPZ334.<sup>9</sup> NSTN argued that NRMC "would not pay us to use our license if they already had their own valid license."<sup>10</sup> In an Opposition to the PTD, MRA denied that NRMC had discontinued operations on Stations KLH414 and KL3784.<sup>11</sup> It explained that NRMC had purchased service on NSTN's station to supplement, rather than replace, its own operations.<sup>12</sup> In response, NSTN again contended that, during the relevant period, NRMC's mobiles had operated exclusively with Station WPPZ334.<sup>13</sup> In addition, NSTN provided a declaration from NSTN's president that "NSTN has routinely monitored the channel in order to maintain ultimate control over the operation of its stations ... [but] never heard [NRMC or its predecessor in interest] use any of its call signs in its transmissions."<sup>14</sup>

3. The Division concluded that NSTN had not substantiated its allegation that the licenses for Stations KLH414 and KL3784 cancelled automatically due to permanent discontinuance of station operation.<sup>15</sup> The Division first found that NSTN's argument that the stations must have discontinued operation because NRMC operated as a customer of NSTN on Station WPPZ334, using the same frequencies as the NRMC stations in the same geographic area, was "purely conjectural, and not persuasive."<sup>16</sup> The Division also noted that "Commission precedent is clear that, at a minimum, proof of detailed monitoring studies must be presented to substantiate allegations of permanent discontinuance of operations."<sup>17</sup> NSTN's brief declaration that it "routinely monitored the channel," the Division explained, fell far short of what is required to demonstrate permanent discontinuance of station operations.<sup>18</sup>

4. As noted, NSTN filed a timely Petition for Reconsideration of the *Order* on May 16, 2006. "The basis for this Petition," according to NSTN, "is the failure of the [*Order*] to discuss or correctly decide the main points raised by the informal petition, which demonstrated that NRMC in fact took a series of affirmative actions, which could only be consistent with a decision to permanently discontinue

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<sup>8</sup> The KLH414 license covers the base station and the KL3784 license authorizes the associated mobile units.

<sup>9</sup> See PTD at 1.

<sup>10</sup> *Id.*

<sup>11</sup> Mobile Relay Associates, Opposition to Informal Petition to Dismiss or Deny, at 2 (filed July 27, 2004) (Opposition to PTD). The Opposition to PTD included declarations under penalty of perjury from principals of MRA and NRMC attesting that the NRMC stations have been in continuous operation, including during the four-year period when NRMC was a customer of NSTN.

<sup>12</sup> *Id.*

<sup>13</sup> See Response of National Science and Technology Network, Inc. (NSTN) to Opposition to Informal Petition to Dismiss or Deny, at 1 (filed August 16, 2004) (NSTN Response).

<sup>14</sup> See *id.*, Declaration of Ted S. Henry at 3.

<sup>15</sup> See *Order*, 21 FCC Rcd at 5152 ¶ 5.

<sup>16</sup> *Id.* at 5152-53 ¶ 5. The Division held that "[t]he fact that a private land mobile radio licensee also operates mobiles on a co-channel private land mobile radio station licensed to another party does not demonstrate that the licensee has discontinued operation of its own station(s). [footnote omitted] It is plausible that the licensee would use the other station's facilities to augment its own operations, as MRA asserts is the case here." *Id.*

<sup>17</sup> *Id.* at 5153 ¶ 6 (citing Cellular Design Corporation, *Memorandum Opinion and Order*, 14 FCC Rcd 13059, 13064 ¶ 12 (1999) (*Cellular Design*); Quatron Communications, Inc., *Memorandum Opinion and Order*, 15 FCC Rcd 4749, 4753 ¶ 13 (2000) (*Quatron*); Mayer Reprographics, Inc., *Order on Reconsideration*, 18 FCC Rcd 11328, 11330 ¶ 7 (WTB PSPWD 2003); Bay Ventures, *Order*, 17 FCC Rcd 8766, 8771 ¶ 18 (WTB CWD 2002)).

<sup>18</sup> *Id.* As the Division noted, an assertion that a frequency was monitored routinely does not obviate the need for detailed monitoring logs or similar records to substantiate the monitoring. *Id.* at 5153 n.15 (citing Brookfield Development, Inc., *Memorandum Opinion and Order*, 19 FCC Rcd 14385, 14391 ¶ 18 (2004)).

operation of their stations, more than one year before the assignment [application was filed].”<sup>19</sup> We also have before us an Opposition filed by MRA, and a Reply filed by NSTN.<sup>20</sup>

5. *Discussion.* Reconsideration is appropriate only where the petitioner either demonstrates a material error or omission in the underlying order or raises additional facts not known or not existing until after the petitioner’s last opportunity to present such matters.<sup>21</sup> A petition for reconsideration that simply reiterates arguments that were previously considered and rejected will be denied.<sup>22</sup> We find that NSTN’s Petition neither demonstrates material error or omission in the *Order*, nor raises any new facts unavailable to NSTN when it filed the PTD.

6. NSTN argues that the Division “ignored substantial and important evidence, when it decided to accept” NRMC’s and MRA’s assertion of continuous operation during the period when NRMC was a customer of NSTN.<sup>23</sup> We disagree. As a preliminary matter, the Division did not “accept” NRMC’s and MRA’s assertion of continuous operation, as contended by NSTN, but merely noted, by way of background, that NRMC and MRA made the assertion.<sup>24</sup> The Division affirmatively found only that NSTN failed to meet its burden to demonstrate that, contrary to the applicants’ assertion, the stations had discontinued operation for one year or more.<sup>25</sup> In reaching that conclusion, moreover, the Division did not ignore any evidence, but simply found NSTN’s arguments to be unpersuasive.<sup>26</sup> As we explain

<sup>19</sup> Petition at 1.

<sup>20</sup> Mobile Relay Associates, Opposition to Petition for Reconsideration (filed May 31, 2006); National Science and Technology Network, Inc., Reply to Opposition to Petition for Reconsideration of Denial of Informal Petitions to Dismiss or Deny Submitted by National Science and Technology Network, Inc. (NSTN) (filed June 7, 2006).

<sup>21</sup> *WWIZ, Inc.*, 37 F.C.C. 685, 686 ¶ 2 (1964), *aff’d sub. nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966).

<sup>22</sup> *Id.* (stating that “it is universally held that rehearing will not be granted merely for the purpose of again debating matters on which the tribunal has once deliberated and spoken”); *see also* 47 C.F.R. § 1.106(c).

<sup>23</sup> *See* Petition at 2.

<sup>24</sup> *See Order*, 21 FCC Rcd at 5151-52 ¶ 3.

<sup>25</sup> *Id.* at 5152 ¶ 3 (concluding “that NSTN *has not substantiated its allegation* that the licenses for Stations KLH414 and KL3784 have cancelled automatically due to permanent discontinuance of station operation”) (emphasis added).

<sup>26</sup> In the Petition, NSTN provides a list of what it believes to be relevant evidence, comprised of ten discrete items, that the Division ignored. We note that the information and arguments in question were not mentioned in the PTD, but only in responsive pleadings. The one-page PTD provided only the following in support of its claim of permanent discontinuance of operation:

The licenses KLH414 and KL3784 which National Ready Mixed Concrete Co. seeks to transfer to Mobile Relay Associates pursuant to the subject application both automatically cancelled due to permanent discontinuance of station operation many years ago.

We can state this with certainty because National Ready Mix Concrete Co. has been our customer, paying us \$960.00 per month to operate under the Private Carrier license of National Science & Technology Network Inc. Call Sign WPPZ 334 for more than 4 years. We are licensed for 180 units on the channel at Sierra Peak and Mt. Lukens. National Science has the only valid licenses on channel pair 471/474.6125 mHz [sic] in the Los Angeles area.

Clearly National Ready Mix Concrete Co. would not pay us to use our license if they already had their own valid license.

On this record, the Division correctly characterized the PTD as premised solely on a supposition that the stations must have discontinued operation because NRMC was operating as a customer of NSTN using the same frequencies

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below, moreover, it would have been unproductive to undertake a lengthy discussion of every nuance of NSTN's allegations and arguments inasmuch as NSTN's failure to provide detailed evidence of monitoring is dispositive of this matter.

7. NSTN argues in the Petition that the Division gave undue weight to NSTN's failure to submit detailed monitoring studies to substantiate its claim of discontinuance of operation.<sup>27</sup> According to NSTN, the Division failed to recognize that "the monitoring evidence was peripheral, not central, to NSTN's case."<sup>28</sup> In making this argument, NSTN misconstrues the Division's holding in the *Order*, as well as established Commission precedent. Rather than being just one possible component of a showing that a station has discontinued operations – to be emphasized, relied upon secondarily, or completely omitted at the petitioner's discretion – detailed monitoring evidence, absence unusual circumstances, is a prerequisite to establishing that discontinuance has occurred. Given that NRMC and MRA specifically denied the allegation of discontinuance, NSTN was *required*, at minimum, to provide detailed monitoring evidence. As the Division observed in the *Order*, clear Commission precedent holds that proof of detailed monitoring studies "*must* be presented" to substantiate a claim of discontinuance.<sup>29</sup> NSTN did not provide any such proof of detailed monitoring studies, belatedly offering only a cursory statement under penalty of perjury that NSTN did routinely monitor the channel.<sup>30</sup> The Division correctly held that this submission fell far short of what is required. That NSTN was a co-channel licensee to NRMC does not obviate the need for monitoring studies.<sup>31</sup>

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in the same geographic area. *See Order*, 21 FCC Rcd at 5152 ¶ 5. If NSTN was in possession of what it considered specific information to substantiate its allegation, it should not have withheld disclosure of that information until the filing of responsive pleadings. *Cf. Colorado Radio Corp. v. Federal Communications Commission*, 118 F.2d 24, 26 (D.C. Cir. 1941) (holding that a litigant should not be allowed "to sit back and hope that a decision will be in its favor, and then, when it isn't, to parry with an offer of more evidence"); *Area Christian Television, Inc., Memorandum Opinion and Order*, 60 Rad. Reg. 2d (P&F) 862, 864 (1986) (holding that informal objections, as well as petitions to deny, must contain "adequate and specific factual allegations sufficient to warrant the relief requested"). In any event, and as discussed in the text, NSTN's failure to submit detailed monitoring evidence is dispositive of this matter, irrespective of other deficiencies in the PTD.

<sup>27</sup> *See* Petition at 2 (stating that the Division "wrongly decided that NSTN failed to provide its case because it failed to show that NSTN had monitored NRMC's channel 24/7 for a full year" and that the Division "made much of the fact that the monitoring was not documented in a log and used this fact to erroneously conclude that NSTN failed to prove its case").

<sup>28</sup> *Id.* NSTN says that the purpose of the monitoring evidence was only to corroborate the other, purportedly more substantial evidence of discontinuance adduced by NSTN. *Id.*

<sup>29</sup> *See Order*, 21 FCC Rcd at 5153 ¶ 6 (emphasis added). In the Petition, NSTN does not attempt to distinguish, and in fact does not even mention, the cases relied upon by the Division as controlling precedent regarding the requirement for detailed monitoring evidence. *See id.* at 5153 nn.13-15

<sup>30</sup> *See* NSTN Response, Declaration of Ted S. Henry at 3. Submitted only in a responsive pleading, on the last page of a declaration by Ted S. Henry that mostly discusses other matters, NSTN's discussion of its monitoring activity is limited to the following: "NSTN has routinely monitored the channel in order to maintain ultimate control over the operation of its stations. We never heard URM [NRMC's predecessor in interest] or NRMC use any of its call signs in its transmissions. Recent monitoring indicates that National Ready Mixed Concrete no longer uses the stations for the dispatching of its concrete trucks. The only traffic heard is from two mobile units."

<sup>31</sup> *See* Mayer Reprographics, Inc., *Order on Further Reconsideration*, DA 07-149, ¶ 8 (WTB MD rel. Jan. 23, 2007) ("Pennington did not submit monitoring studies to substantiate claims that operation of Station KNGK514 had permanently discontinued and therefore cancelled automatically. Pennington argues that she was not engaged in mere 'sporadic monitoring' because, as a co-channel licensee, she had to monitor the channel before transmitting, which obviates the need for detailed monitoring studies. [footnote omitted] We disagree, for Commission

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8. *Conclusion and Ordering Clauses.* NSTN has not identified any error in the Division *Order* or otherwise demonstrated any basis to reconsider the conclusions therein. In particular, NSTN is mistaken in contending that the Commission gave undue weight to the omission of detailed monitoring studies in finding that NSTN did not substantiate its allegation of permanent discontinuance of station operations. In order to demonstrate a permanent discontinuance of operations resulting in automatic cancellation of the licenses for Stations KLH414 and KL3784, NSTN was required to provide detailed monitoring evidence, in accord with settled Commission policy and precedent. It failed to do so. Accordingly, the *Order* correctly denied NSTN's Petition to Dismiss or Deny the captioned application. We therefore deny NSTN's Petition for Reconsideration of the *Order*.

9. ACCORDINGLY, IT IS ORDERED that, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, the Petition for Reconsideration of Denial of Informal Petitions to Dismiss or Deny Submitted by National Science and Technology, Network, Inc. (NSTN) filed by National Science and Technology, Network, Inc. on May 16, 2006, IS DENIED.

10. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Scot Stone  
Deputy Chief, Mobility Division  
Wireless Telecommunications Bureau

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precedent rejects claims based on casual monitoring, even when the complainant is a co-channel licensee.”) (citing, e.g., *Quatron*, 15 FCC Rcd at 4753 ¶ 13; *Cellular Design*, 14 FCC Rcd at 13064 ¶ 12).